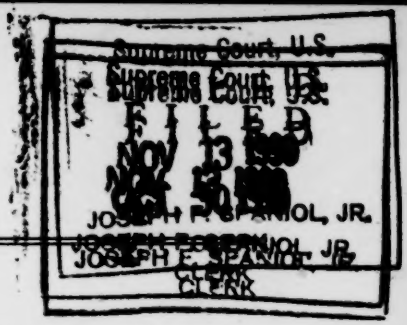

90-764
No. _____

In The

Supreme Court of the United States

October Term, 1990

MARK FISCHER,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Ohio

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Was the petitioner denied rights guaranteed by the First, Sixth and Fourteenth Amendments when at his trial on an obscenity charge, the allegedly obscene videotape forming the basis of the charge was never offered into evidence, but instead petitioner was convicted on the basis of an altogether different videotape offered and received into evidence over his objection?

II.

May an erroneous jury instruction which directly (and not merely by operation of a presumption) reduces the prosecution's burden of proof on an essential and contested element of an offense, in violation of the Sixth and Fourteenth Amendments, ever be deemed harmless error, and if so, was

it harmless beyond a reasonable doubt in this case?

III.

Are contemporary community standards in an obscenity prosecution to be assessed in terms of what the community finds acceptable or are such standards to be assessed in terms of what the community generally tolerates?

IV.

In an obscenity prosecution is the accused constitutionally entitled to have the jury instructed that if it is unable to determine what the standards of the community are in regard to sexually explicit material, it must find the accused not guilty?

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No.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1990

MARK FISCHER,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Petitioner, Mark Fischer, prays that a writ of certiorari issue to review the judgment of the Ohio Supreme Court dismissing petitioner's appeal for want of a substantial constitutional question and letting stand the opinion of the Court of Appeals of Ohio, Eighth District, County of Cuyahoga.

OPINIONS BELOW

The unreported order of the Ohio Supreme Court dismissing petitioner's appeal for want of a substantial constitutional question is set forth in the Appendix at A1. The unreported journal entry and opinion of the Court of Appeals of Ohio, Eighth District, County of Cuyahoga, is set forth in the Appendix at A2. The nunc pro tunc journal entry and opinion of the Court of Appeals of Ohio, Eighth District, County of Cuyahoga, correcting its opinion is set forth in the Appendix at A40. The unreported order of the Court of Appeals of Ohio, Eighth District, County of Cuyahoga, overruling petitioner's motion for reconsideration is set forth in the Appendix at A42. The unreported order of the Court of Appeals of Ohio, Eighth District, County of Cuyahoga, overruling petitioner's motion to certify the case to the Ohio Supreme

Court is set forth in the Appendix at A43.

JURISDICTION

The order of the Ohio Supreme Court dismissing petitioner's appeal for want of a substantial constitutional question was entered on August 15, 1990. This Court has jurisdiction to review that judgment by writ of certiorari under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved are the First, Sixth and Fourteenth Amendments to the Constitution of the United States. The statutory provision involved is OHIO REV. CODE ANN. § 2907.32(A) (Page's 1987). Section 2907.32(A) was amended subsequent to petitioner's conviction. The amendment has no relevance to the issues presented to this Court. The foregoing constitu-

tional and statutory provisions are set forth in the Appendix at A44-A48.

STATEMENT OF THE CASE

Petitioner Mark Fischer, a bookstore clerk, was convicted of pandering obscenity under OHIO REV. CODE ANN. § 2907.32 (A)(5) (Page's 1987) in Cleveland Municipal Court. On August 10, 1988, the trial judge sentenced petitioner to six months in jail, with three months suspended, fined him $1000 and costs and placed him on probation for one year.[1/] Transcript of August 10, 1988 Sentencing

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[1/] The entire sentence was stayed pending petitioner's state court appeals. Following the dismissal of his appeal to the Ohio Supreme, the trial court, on November 7, 1990, suspended the three month jail component of petitioner's sentence.

at 3.[2]

The basis of the prosecution of petitioner arose from a Cleveland police officer's viewing of a 30-minute videotape on the premises of the bookstore where petitioner was employed as a clerk. Detective Gregory King of the Cleveland Bureau of Special Operations Strike Force testifed that on February 1, 1988, he was assigned to investigate Detroit Avenue News, a retail bookstore located in Cleveland, Ohio. Tr. at 249-50.

Detective King testifed that he first entered Detroit Avenue News at

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[2] "Tr." refers generally to the transcript of petitioner's jury trial conducted on June 29-July 1, and July 5, 1988; this two-volume transcript, however, also contains a four-page transcript of petitioner's February 3, 1988 arraignment, and a four-page transcript of petitioner's sentencing on August 10, 1988. To avoid confusion, references to the transcript of petitioner's sentencing will be designated as "Tr. of August 10, 1988 Sentencing."

about 10:00 a.m. on February 1st, and after browsing for a few minutes in the front part of the store, he approached the check-out counter. Tr. at 250-53, 254, 271. King asked one of two gentlemen standing behind the counter (neither of whom was petitioner) for $5.00 worth of tokens. Tr. at 250-51, 271. In exchange for $20.00, King received a roll of 20 tokens and $15.00 in change. Tr. at 250-52, 271-72.

With these tokens, King headed to a separate portion of the store located in the rear of the premises. This separate area contained numerous individual viewing booths where patrons could view a video of their choice. Tr. at 253-55. Some booths contained as many as eight movie choices, whereas other booths had only one or two videos on display. Tr. at 254. To activate the viewing monitor and video, a customer placed a token

into a coin receptacle. Tr. at 257.

King entered Booth 10, which had only one video on display. Tr. at 254-45, 272-73. Upon entering the booth, he deposited tokens into the coin receptacle and watched a two-scene, 30-minute videotape from beginning to end entitled "La Boomba." Tr. at 256, 259-60, 272-74. King testified that he was certain that the video he viewed in Booth 10 was only 30 minutes in length because he played it from beginning to end and then watched part of the beginning scene again. Tr. at 257-60, 272-74, 279-80. King then left the store. Tr. at 260.

Following his visit, King swore out an affidavit in support of a search warrant describing the fact that he had purchased tokens and viewed a 30-minute videotape. Tr. at 260. A search warrant authorizing the seizure of the 30-minute videotape he had viewed was issued.

On the afternoon of February 1, 1988, King returned to Detroit Avenue News for the express purpose of determining whether the video he had seen that morning was still on the premises. Tr. at 260. When King entered the store this second time, petitioner was behind the counter. Tr. at 260-61. King requested and received $5.00 worth of tokens from petitioner and proceeded to the video viewing area of the store where he again entered Booth 10, activated the viewing screen and watched a portion of a video which, he testified, he was certain was the same video he had seen earlier in the day. Tr. at 260-62, 275-76, 278. King left the store once again and informed his supervisor that the video he had seen in the morning was still on the premises. Tr. at 267. A search and seizure was conducted that same day.

King's testimony regarding the

exchange of money for tokens constituted the sum and substance of the prosecution's evidence as to any conduct on petitioner's part. King admitted on cross-examination that he had no evidence, for instance, that petitioner set store policies, selected merchandise, determined prices or displayed goods. Tr. at 275. Rather, King testified that petitioner was merely a clerk that day who waited on customers. Id.

The prosecution then called Sgt. Roger Dennerll, another member of the Bureau of Special Operations Strike Force, as their second and last witness. Tr. at 294. Sgt. Dennerll was called to identify the objects seized during the course of the February 1, 1988 search of Detroit Avenue News, including a video cassette tape marked as Plaintiff's Exhibit 5, and to establish that the tape seized was the same tape which Detective

King had been investigating. However, if anything, Sgt. Dennerll's testimony tended to establish that Plaintiff's Exhibit 5 was seized from a different location than where King had viewed it, and may have been a wholly different tape which was on display in another viewing booth. Tr. at 298-323.

Any doubt that the videotape seized was different from that forming the basis of the charge was completely removed once the videotape was played. The videotape played for the jury over petitioner's objection was 46 minutes longer than the videotape viewed by Detective King. Tr. at 331-332.

Detective King was adamant in his testimony that the videotape he viewed was 30 minutes in length from start to finish. Tr. at 279-280. King testified that if the videotape offered into evidence by the prosecution were

longer than 30-minutes, it would be a different videotape than the one he viewed on the premises of the bookstore which formed the basis of the charge against petitioner. The playing time of Plaintiff's Exhibit 5 also entitled "La Boomba" which was shown to the jury, was 76-minutes in length. Over petitioner's objection, the videotape was admitted into evidence.

At the close of the prosecution's case-in-chief, petitioner moved for a judgment of acquittal pursuant to Rule 29, Ohio R. Crim. Pro., which motion was denied. Tr. at 345, 349-69.

Petitioner called two expert witnesses to the stand to provide the jury with evidence with respect to the first two prongs of the test for obscenity in Miller v. California, 413 U.S. 15, 93 S.Ct. 2440 (1973). The defense then rested. Tr. at 585. Petitioner reas-

serted his motion for judgment of acquittal at the close of the evidence, which was again denied. Tr. at 586.

The trial court charged the jury, and petitioner made timely objections to the charge. Tr. at 592-604, 661-66. Specifically, petitioner objected to the court's instruction that the State could meet its burden of proof by showing that petitioner "should have known" the character of the videotape when an essential element of Ohio's obscenity statute requires knowledge of the character of the videotape. OHIO REV. CODE ANN. § 2907.32(A) (Page's 1987). Tr. 639-40, 661. Petitioner also objected to the trial court's refusal to instruct the jury that if it could not ascertain the contemporary community standards against which the videotape should be measured, it must return a verdict of acquittal. Defendant's Requested

Jury Instruction No. V, Tr. at 666. Additionally, petitioner objected to the trial court's instruction directing the jury to assess community standards with regard to what the community finds acceptable as opposed to petitioner's proposed instruction directing it to assess what the community generally tolerates. Defendant's Requested Jury Instruction No. III, Tr. at 646-48.

The jury thereafter deliberated on July 5, 1988, asking once during its deliberations to be reinstructed on the three-pronged test for obscenity. Tr. at 671-74. The jury returned a verdict of guilty that afternoon. Tr. at 676.

Petitioner filed a timely appeal to the Court of Appeals for the Eighth Judicial District of Ohio raising, inter alia, each of the constitutional issues presented by this petition.

The court of appeals agreed with

many of petitioner's contentions and found that numerous errors had been made by the trial court. First, the court of appeals agreed that the prosecution's own evidence established that the videotape offered at trial was not the same videotape viewed by Detective King, and thus was not the videotape which formed the basis of the charge against petitioner. Opinion at 6; App. at A10.

Specifically, the court of appeals wrote:

> Detective King's affidavit stated that the videotape entitled "La Boomba" was approximately thirty minutes in length. He reaffirmed that length at trial. The videotape played to the jury, however, had a running time of seventy-six minutes.2/

2/ It appears that the thirty minute version of "La Boomba" was edited from the seventy-six minute version. When the search warrant was executed, police officers seized a videotape entitled "La Boomba" without realizing that the bookstore was showing different versions

of that movie.

Opinion at 5, App. at A8. The court continued:

> The videotape of "La Boomba" was offered as real evidence to support the charge of pandering obscenity. As such, there must have been a demonstration that the videotape was the (emphasis in original) tape viewed by Det. King. Gutman v. Industrial Comm. (1942), 71 Ohio App. 383; see, generally, McCormack, Evidence (3 Ed. Cleary Ed. 1984) 667, Section 212. Detective King's testimony showed that the tape played to the jury was not the identical videotape he viewed prior to his swearing out the affidavit for the search warrant.

Opinion at 6, App. at A9-A10. (Emphasis added).

The court of appeals, however, concluded that no error had been committed by the trial court in admitting the 76-minute tape into evidence because the jury could have concluded the videotape was authentic, and because the sexual acts depicted in the 76-minute videotape

were similar to the sexual acts depicted in the 30-minute videotape as described by Detective King. Id. at 6-7; App. at 10-11. The court let stand petitioner's conviction over his objections on constitutional as well as evidentiary grounds even though the videotape forming the basis of the charge against petitioner was never shown to the jury.

The court of appeals also agreed with petitioner that the trial court had erred in its instructions to the jury. The court of appeals held, first, that the trial court had erred in instructing the jury that "the culpable mental state could be proven by proof that defendant 'should have known' the character of the material involved, when the statute clearly required proof that defendant knew the character of the material involved." Opinion at 17; App. at A29. Notwithstanding petitioner's claims that

the instruction violated due process and his right to a trial by jury, the court concluded that the error was harmless because, "[h]ad the erroneous language of the jury instruction been deleted, there was more than sufficient evidence upon which the jury could conclude that defendant's knowledge had been proved beyond a reasonable doubt." Id. at 18-19; App. at A31. In essence, the appellate court reasoned that even though the trial court's instructions erroneously lessened the prosecution's burden of proof on an essential element of the offense concerning petitioner's mental state, the error was "harmless" because had the jury been correctly instructed on the prosecution's burden of proof, the jury could have concluded that that burden had been met based on the evidence.

As to community standards, the

court of appeals agreed, "as an abstract proposition of law" with petitioner's requested jury instruction based on First Amendment principles that he was entitled to a verdict of not guilty if the jury were unable to ascertain the contemporary community standards of Cleveland. Opinion at 20; App. at A34. The court held, however, that the requested instruction did not have to be given since the jury was instructed on "reasonable doubt," and petitioner had produced substantial evidence on the issue of community standards.

Finally, the court of appeals rejected petitioner's contention that it was constitutional error for the trial court to instruct the jury that community standards are set by what the community in fact finds acceptable, as opposed to what the community as a whole tolerates - completely ignoring the compelling con-

stitutional authority cited by petitioner. Opinion at 16-17; App. at A27-A28.

Petitioner applied for reconsideration of the decision again raising the constitutional errors committed by the trial court. Petitioner's motion was denied. App. at A42.

On March 7, 1990, petitioner appealed to the Supreme Court of Ohio asserting in his Memorandum in Support of Jurisdiction the same constitutional errors detailed before the court of appeals. The Supreme Court of Ohio dismissed petitioner's appeal for want of a substantial constitutional question on August 15, 1990. App. at A1.

Consequently, petitioner comes before this Court seeking review of the important constitutional questions raised by petitioner's conviction.

REASONS FOR GRANTING THE WRIT

I.

A SIGNIFICANT QUESTION IS PRESENTED AS TO WHETHER THE PETITIONER WAS DENIED RIGHTS GUARANTEED BY THE FIRST, SIXTH AND FOURTEENTH AMENDMENTS WHEN AT HIS TRIAL ON AN OBSCENITY CHARGE, THE ALLEGEDLY OBSCENE VIDEOTAPE FORMING THE BASIS OF THE CHARGE WAS NEVER OFFERED INTO EVIDENCE, BUT INSTEAD PETITIONER WAS CONVICTED ON THE BASIS OF AN ALTOGETHER DIFFERENT VIDEOTAPE OFFERED AND RECEIVED INTO EVIDENCE OVER HIS OBJECTION.

Petitioner's obscenity conviction raises important constitutional questions implicating not only the First Amendment's protection of free speech, but also the due process and jury trial clauses of the Sixth and Fourteenth Amendments. At the heart of the case now presented for review stands a phenomenon at odds with First Amendment jurisprudence as developed by this Court as well as simple notions of due process and the Sixth Amendment's guarantee of a right to a trial by jury.

Petitioner was charged and tried on the theory that he had sold tokens to a police detective which the detective used to view an allegedly obscene 30-minute videotape entitled "La Boomba." That 30-minute videotape was never shown to the jury, however. Instead, over objection by the defense, the jury was shown an altogether different videotape, also entitled "La Boomba," than the videotape with which petitioner was charged. The videotape offered into evidence and shown to the jury was 76 minutes in length and, as the court of appeals acknowledged, was not the one the detective viewed by use of the tokens petitioner had sold him at the time of the alleged offense.

It should go without saying that when a defendant is charged with disseminating or controlling a specific item alleged to be obscene, the prosecution can only prove its case by producing and

then proving the obscene character of the item which was allegedly disseminated or controlled by that defendant, and not by producing and proving the obscene character of a different item. For, it is fundamental that due process requires that a conviction cannot rest upon a charge not made or a charge not tried. Gregory v. City of Chicago, 394 U.S. 111, 112 (1969); Garner v. Louisiana, 368 U.S. 157, 164 (1961); Cole v. Arkansas, 333 U.S. 196, 201 (1948); see also Jackson v. Virginia, 443 U.S. 307, 323-24 (1979) (due process requires that "even a thief [be] entitled to complain that he has been unconstitutionally convicted and imprisoned as a burglar"). Where the obscenity of an item is at issue, this fundamental principle requiring proof of the charge actually made takes on even greater importance, since the First Amendment requires a presumption of non-

obscenity until a trier of fact, upon reviewing the charged item in its entirety and in accordance with the three-prong test for obscenity enunciated in Miller v. California, 413 U.S. 15, 24 (1973), declares that the particular work at issue is obscene. See New York v. P.J. Video, Inc., 475 U.S. 868, 873, 106 S.Ct. 1610, 1614 (1986); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 66 (1963); Roaden v. Kentucky, 413 U.S. 496 (1973).

The Miller obscenity test itself is founded on the premise that a work, as a factual matter, is not obscene unless the work itself as a whole - not one similar to it - meets all three prongs of the obscenity test. Thus, a finding that a 76-minute version of "La Boomba" is obscene under the Miller test in no way reflects on the obscenity of the 30-minute version with which petitioner was charged.

Petitioner, who stood charged with an obscenity offense relating to the 30-minute version of "La Boomba," was constitutionally entitled to a jury determination as to whether this specific work met each of the three prongs of the Miller test. Petitioner never had a jury determination on these issues. The jury never viewed the specific film at issue, but viewed instead a film containing 46-minutes of footage that was definitely not contained in the videotape with which petitioner was charged.

The court of appeals, while acknowledging that the videotape offered into evidence and published to the jury was different from that forming the basis of the charge against petitioner, did not address the constitutional issues raised by such discrepancy. The court treated the error simply as an evidentiary matter - finding that the jury was the final ar-

biter of authenticating evidence and that the difference in running time of the videotapes was of "no significance." Opinion at 7; App. at A11.

However, the admission of the wrong videotape was not simply an evidentiary error, but offended basic notions of due process, carefully charted First Amendment principles set forth by this Court and petitioner's inviolate right to a trial by jury. Simply put, the appellate court's conclusion that the State is permitted to try its case and ultimately obtain a conviction in an obscenity prosecution without ever having a jury review the specific work which is alleged to be obscene, and that the State can obtain a conviction by proving that an admittedly different, but "similar," work is obscene, cannot be squared with Miller v. California, 413 U.S. 15 (1973), nor with nearly thirty years of Supreme

Court precedent. The trial court should have sustained petitioner's objection to the admission into evidence of the wrong videotape and should have entered a judgment of acquittal on the basis that the prosecution failed to sustain its burden of proof in showing that the work over which petitioner allegedly had control was obscene. On appeal, the reviewing court should have likewise entered a judgment of acquittal on due process and First Amendment grounds, or at the very least, reversed on the ground that constitutional error had been committed when the trial court admitted the wrong videotape into evidence.

Both courts failed to grant appropriate relief for the constitutional error.

The important constitutional issues raised by petitioner's conviction deserve review by this Court.

II.

AN IMPORTANT QUESTION IS PRESENTED AS TO WHETHER AN ERRONEOUS JURY INSTRUCTION WHICH DIRECTLY (AND NOT MERELY BY OPERATION OF A PRESUMPTION) REDUCES THE PROSECUTION'S BURDEN OF PROOF ON AN ESSENTIAL AND CONTESTED ELEMENT OF AN OFFENSE, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS, CAN EVER BE DEEMED HARMLESS ERROR, AND IF SO, WHETHER IT WAS HARMLESS BEYOND A REASONABLE DOUBT IN THIS CASE.

It has been firmly established that no criminal defendant can constitutionally be convicted of an offense absent proof beyond a reasonable doubt of each essential element of the offense charged. In re Winship, 397 U.S. 358 (1970). Moreover, under the Sixth and Fourteenth Amendments, a defendant is entitled to a trial by jury of his peers. Duncan v. Louisiana, 391 U.S. 145 (1968).

In order adequately to secure these rights, this Court has recognized that a jury in a criminal case must be

given complete, proper instructions on each essential element of the offense. See Osborne v. Ohio, ___ U.S. ___, 110 S.Ct. 1691, 1704-1705 (1990); Mullaney v. Wilbur, 421 U.S. 684 (1975); Patterson v. New York, 432 U.S. 197 (1977); Sandstrom v. Montana, 442 U.S. 510 (1979); Francis v. Franklin, 471 U.S. 307 (1985); Rose v. Clark, 478 U.S. 570 (1986); Martin v. Ohio, 480 U.S. 228 (1987). Proper jury instructions therefore must require the jury to find proof beyond a reasonable doubt of each essential element of the offense charged.

In the instant case, over defense objection, the trial court instructed the jury that the prosecution had the burden to prove that petitioner "[k]new or should have known" the character of the material involved. Tr. at 639-40; 661. However, an essential element of the crime of pandering obscenity

in Ohio is that the defendant have "knowledge of the character of the material or performance involved ...." OHIO REV. CODE ANN. § 2907.32(A) (Page's 1987) (Emphasis added). Under Ohio's criminal code, an accused who should have known, but, in fact, did not know the character of the obscene material he has disseminated is innocent of any wrongdoing. By instructing the jury as it did, however, the trial court rewrote the criminal statute and reduced the prosecution's burden of proof on an essential element of the charged offense. Contrary to the statutory provisions, the trial court instructed the jury that it was required to find the petitioner guilty if it found that petitioner "should have known" the character of the charged videotape. Thus, the trial court directed the jury to return a verdict of guilty if it found petitioner merely negligent in ascer-

taining the character of the videotape with which he was charged and thereby, instructed the jury to convict petitioner on the basis of a degree of scienter clearly not punishable under Ohio law.

The court of appeals agreed with petitioner that this instruction was erroneous. However, the court concluded the error was harmless. The court reasoned: "[h]ad the erroneous language of the jury instruction been deleted, there was more than sufficient evidence upon which the jury could conclude that defendant's knowledge had been proved beyond a reasonable doubt." Opinion at 18-19, App. at 31.

However, the instruction given by the trial court was anything but harmless. Indeed, it was prejudicial under any standard of review, even that accorded to non-constitutional error. Proof of petitioner's knowledge of the character

of the charged videotape was exclusively circumstantial and consisted entirely of petitioner's presence in the bookstore for a short period of time on one day with no proof that he had ever been there before and his brief exchange of money for tokens in the front area of the store. Given the sparse circumstantial evidence in this case, petitioner maintains that a jury could easily have concluded that while he did not actually know the character of the film "La Boomba" playing in the separate arcade area located in the rear of the store, he "should have" known of its character because of the sexually oriented nature of the merchandise located in the front area of the store. If that had been the finding made by the jury, petitioner would have been entitled to a verdict of acquittal. Instead, however, the trial court directed the jury to return a

guilty verdict if it made that finding. The obvious prejudice resulting from this misinstruction cannot be cured by an appellate court's speculation as to what might have occurred had error not been committed. Connecticut v. Johnson, 460 U.S. 73, 86 (1983); Bollenbach v. United States, 326 U.S. 607, 614 (1946). If, in fact, the harmless error doctrine can be appropriately applied to a fundamental error in a jury charge such as that in the instant case, then under that analysis, the erroneous instruction now before this Court for review certainly cannot qualify as harmless.

However, this Court has never applied the harmless-error doctrine to a jury instruction which specifically requires the jury to return a verdict of guilty on a finding of a non-culpable degree of scienter. In a series of decisions, this Court has addressed the pro-

priety of applying the harmless-error doctrine to constitutionally defective jury instructions which direct the jury to indulge in a given presumption if certain facts are established. Rose v. Clark, 478 U.S. 570, 106 S.Ct. 3101 (1986); Pope v. Illinois, 401 U.S. 497, 107 S.Ct. 1918 (1987); Carella v. California, ___ U.S. ___, 109 S.Ct. 2419 (1989).

In applying the harmless-error doctrine to defective jury instructions, the Court has been careful to distinguish jury instructions directing the jury to engage in a presumption from those which involve a direct misinstruction on the essential elements of the crime. Noting that certain instructional error would not be subject to a harmless-error standard of review, the Court in Rose stated that the harmless-error analysis would not apply if, for instance, a trial court

"directed a verdict for the prosecution in a criminal trial by jury." Id. at 578, 106 S.Ct. at 3106. The Court explained:

> We have stated that "a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict ... regardless of how overwhelming the evidence may point in that direction." United States v. Martin Linen Supply Co., 430 U.S. 564, 572-573, 97 S.Ct. 1349, 1355, 51 L.Ed.2d 642 (1977) (citations omitted). Accord, Carpenters v. United States, 330 U.S. 395, 408; 67 S.Ct. 775, 782, 91 L.Ed. 973 (1947). This rule stems from the Sixth Amendment's clear command to afford jury trials in serious criminal cases. See Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968). Where that right is altogether denied, the State cannot contend that the deprivation was harmless because the evidence established the defendant's guilt; the error in such a case is that the wrong entity judged the defendant guilty.

Id.; 106 S.Ct. at 3106 (emphasis added).

The decisions in Rose, Pope and Carella apply to a very narrow category

of constitutionally defective jury instructions. They in no way authorize an appellate court to conduct a harmless-error review of a jury instruction that specifically commands the jury to return a conviction on the basis of facts which under state statute completely exonerate the defendant from wrongdoing. Yet that is precisely what occurred in the appellate court below. Without discussing the actual significance of the trial court's erroneous instruction requiring the jury to return a verdict of guilty if it found that petitioner merely "should have known" the character of the videotape charged, a degree of scienter clearly not culpable under OHIO REV. CODE ANN. § 2907.32(A) (Page's 1987), the court simply determined that enough evidence had been adduced so that a properly instructed jury could have found the petitioner guilty. Opinion at 18; App.

at A30. The court failed to address the erroneous jury instruction's effect of improperly reducing the prosecution's burden of proof on an essential element of the offense and allowing it to obtain a conviction on the basis of a completely innocent degree of scienter. In finding as it did, the appellate court completely ignored the fact that petitioner had a constitutional right to have his guilt or innocence decided by a jury, not by an appellate court. In short, the wrong entity judged the petitioner guilty.

Lower courts are in conflict with one another regarding the propriety of applying the harmless-error doctrine to jury instructions which directly (rather than by operation of a presumption) reduce the prosecution's burden of proof on an essential element of an offense. The Sixth Circuit and D.C. Circuit Courts of Appeals have ruled that

failure to instruct on all elements of an offense cannot be ruled harmless. Hoover v. Garfield Heights Municipal Court, 802 F.2d 168, 175-178 (6th Cir. 1986); United States v. Mentz, 840 F.2d 315, 324 (6th Cir. 1988); but see United States v. Dotson, 840 F.2d 315, 324 (6th Cir. 1990) (finding that an ambiguous and incomplete instruction could be deemed harmless); United States v. Gaither, 440 F.2d 262, 264 (D.C. Cir. 1971). Other circuits have found the issue open to harmless error review. Redding v. Benson, 739 F.2d 1360 (8th Cir. 1984) cert. denied, 469 U.S. 1222, 105 S.Ct. 1210, 84 L.Ed.2d 352 (1985); but see United States v. Voss, 787 F.2d 393, 398-400 and n.4 (8th Cir. 1986); United States v. Brown, 616 F.2d 844, 846 (5th Cir. 1980); United States v. Valdez, 594 F.2d 725, 729 (9th Cir. 1979). The Second, Third and Seventh Circuits have fashioned the rule

that "in general, failure to instruct the jury on an essential element of the offense constitutes plain error." United States v. Kerley, 838 F.2d 932, 939 (7th Cir. 1988); United States v. Golomb, 811 F.2d 787, 793 (2d Cir. 1987); Government of Virgin Islands v. Brown; 685 F.2d 834, 839 (3d Cir. 1982).

Quite obviously, "the picture in the ... circuits is mixed," Kerley, 838 F.2d at 939, and "there is not a clearly preferred answer to the question of whether the failure to instruct on an essential element of the crime charged may be considered harmless error." Hoover, 802 F.2d at 177. A clear, direct statement from this Court is necessary regarding the propriety of applying the harmless-error doctrine to a constitutionally defective jury instruction which directly reduces the prosecution's burden of proof on an essential element of the

offense.

III.

AN IMPORTANT AND RECURRING QUESTION IS PRESENTED AS TO WHETHER, IN AN OBSCENITY PROSECUTION, CONTEMPORARY COMMUNITY STANDARDS ARE TO BE ASSESSED IN TERMS OF WHAT THE COMMUNITY FINDS **ACCEPTABLE** OR WHETHER SUCH STANDARDS ARE TO BE ASSESSED IN TERMS OF WHAT THE COMMUNITY GENERALLY **TOLERATES**.

This Court when elaborating on the three-prong Miller test in Smith v. United States, 431 U.S. 291, 97 S.Ct. 1756 (1977) stated:

> [C]ontemporary community standards must be applied by juries in accordance with their own understandings of the tolerance of the average person in the community.

Id. at 305, 97 S.Ct. at 1766. (Emphasis added). In a variety of contexts discussing the basic analysis to be used in obscenity prosecutions, the Court has consistently referred to the community's tolerance of such material. See FW/PBS, Inc. v. City of Dallas, ___ U.S. ___, 110

S.Ct. 596, 619 (1990) (Scalia, J., concurring in part and dissenting in part) ("It is necessary, to be sure of protecting valuable speech, that we compel all communities to tolerate individual works that have only marginal communicative content beyond raw sexual appeal ...."); New York v. Ferber, 458 U.S. 747, 761, n. 12 (1982) ("It would be equally unrealistic to equate a community's toleration for sexually oriented material with the permissible scope of legislation aimed at protecting children from exploitation."); Jacobellis v. Ohio, 378 U.S. 184 (1964) ("Communities vary in their toleration of alleged obscenity."); Pinkus v. United States, 436 U.S. 293, 304 (1978) (in remanding the case and in considering the proffer of "comparison" evidence by the defendant, the court noted that the theory for such submission was that "the display of such movies had

altered the level of community tolerance."); Manual Enterprises v. Day, 370 U.S. 478, 490 (1962) ("divorced from their 'prurient interest' appeal ..., these portrayals of the male nude cannot fairly be regarded as more objectionable than many portrayals of the female nude that society tolerates.").

Defining community standards in terms of what its general population tolerates is a simple manifestation of the very purpose and philosophy of the First Amendment. The First Amendment was not designed to protect majority opinion or popular expression. Rather, it stands as a testament to our security as a democracy to tolerate the controversial, the unorthodox and the unpopular. See, L. Bollinger, The Tolerant Society: Freedom of Speech and Extremist Speech in America, (1986); Collin v. Smith, 578 F.2d 1197 (7th Cir.) cert. denied, 439

U.S. 916 (1978). Its strength lies in its tolerance for robust debate and the free and unfettered exchange of ideas.

In this case, petitioner requested, in writing, that the trial court instruct the jury that community standards are determined by what the community as a whole tolerates. See Defendant's Requested Jury Instruction No. III. Over strenuous defense objection, the court instructed the jury in no uncertain terms that community standards are determined by what the community in fact finds acceptable. Tr. at 646-48.

The trial court's instruction directing the jury to determine whether the sexually explicit videotape offended the community's notions of acceptability clashed directly with the First Amendment's contemplated purpose. A standard of "acceptance" connotes the popular beliefs, opinions and values embraced by

the majority - which may dictate who sits in the White House or on Capitol Hill, but may not dictate the scope of First Amendment expression. As Justice Blackmun noted in his partial concurrence and dissent in Pope v. Illinois, 481 U.S. 497, 506 (1987):

> The Court's opinion [in Pope] stands for the clear proposition that the First Amendment does not permit a majority to dictate to discrete segments of the population... the value that may be found in various pieces of work.

Indeed, this Court has explicitly declared that expression "need not meet standards of acceptability" to merit protection under the First Amendment. Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971). (Emphasis added).

Of equal significance is the contradiction the use of the "acceptability standard" creates under the Miller test itself. For, it is easy to conceive

of a book, magazine or film which the average person in a given community would not affirmatively find to be acceptable in the sense of embracing it or agreeing with its message, but which nonetheless would not offend the average person. Yet, even if the community as a whole were simply offended by such a work, that fact would not justify a finding of obscenity, and thus suppression of that work. Rather, before such a work can constitutionally be adjudged obscene, it must be found to be patently offensive and, therefore, not tolerated by community standards.

While assessment of expressive material in the context of what the community tolerates certainly flows from the principles set forth in this Court's opinions as well as this Court's usage of the word "tolerates" in this context, the precise issue presented here has never

been resolved by this Court. As a consequence, the trial court's erroneous instruction in the case at bar was not an aberration. Other lower courts have employed the acceptability standard as well. See United States v. Pryba, 900 F.2d 748, 758-759 (4th Cir.) cert. denied, 59 LW 3292 (1990); United States v. Battista, 646 F.2d 237, 245 (6th Cir.) cert. denied, 454 U.S. 1046 (1981); Sedelbauer v. State, 428 N.E.2d 206, 210-211 (Ind. 1981) cert. denied, 455 U.S. 1035 (1982). See also, Hoover v. Byrd, 801 F.2d 740, 741-742 (5th Cir. 1986).

The tolerance versus acceptance conflict raises a recurring issue present in each obscenity prosecution. Because this issue is constantly and consistently in conflict in each obscenity prosecution, a clear directive from this Court is needed to resolve any ambiguity regarding the reach of First Amendment

protection under the Miller test.

IV.

AN IMPORTANT QUESTION IS RAISED AS TO WHETHER THE ACCUSED IN AN OBSCENITY PROSECUTION IS CONSTITUTIONALLY ENTITLED TO HAVE THE JURY INSTRUCTED THAT IF IT IS UNABLE TO DETERMINE WHAT THE STANDARDS OF THE COMMUNITY ARE IN REGARD TO EXPLICIT SEXUAL MATERIAL, IT MUST FIND THE ACCUSED NOT GUILTY.

Before any material can be adjudged obscene, the trier of fact must evaluate the particular expression against the "contemporary community standards." Miller v. California, 413 U.S. 15, 24 (1973). It is against the standards of the relevant community that the trier of fact must assess whether the materials at issue appeal to the prurient interest and whether they are patently offensive. The trier of fact is not free to substitute his or her own personal standards of good taste, morality or acceptability. His or her directive is

to evaluate the materials in light of the relevant community standards. As such, the contemporary community standards in and of themselves under the Miller test are essential components of an obscenity violation.

At trial, petitioner requested the court to give the following instruction:

> If you cannot determine from the evidence what the standards of the community are in regard to explicit sexual material, you must find the defendant not guilty.

Defendant's Requested Jury Instruction No. V. See also Tr. at 666. The trial court refused.

The highest courts of two states have recognized the constitutional significance of such an instruction. In Commonwealth v. Trainor, 374 Mass. 796, N.E.2d 1216, 1219 (1978), the Supreme Court of Massachusetts stated that a de-

fendant in an obscenity prosecution is entitled to an instruction that, "if the trier of fact cannot determine Commonwealth norms, the defendant is entitled to a finding in his favor ...." Following the Trainor court's lead, the Hawaii Supreme Court reversed a conviction on the ground that the trial court in an obscenity case failed to instruct the jury that it must return a verdict of not guilty for the defendant in the event that it is unable to identify a community standard. State v. Kam, 726 P.2d 263, 265 (Hawaii 1986).

The court in Kam explained the dilemma that results when a trial court fails properly to instruct the jury on this point; namely, that since obscenity convictions are dependent upon a finding that contemporary community standards have been violated, a failure to instruct the jury that it must first find that

contemporary community standards exist "could be construed by the jury as mandating them to decide that there are contemporary community standards." Kam, 726 P.2d at 265. However, since contemporary community standards "may, or may not, in fact, exist," a failure to instruct the jury properly would impermissibly take the issue of whether such standards exist away from the jury. Id.

The premise underlying the requirement for the Kam instruction, is that the prosecution in an obscenity case bears the burden of proving every element of the offense beyond a reasonable doubt, including that the charged material is obscene. Since ascertaining contemporary community standards is a prerequisite to finding that such standards have been exceeded under the first two prongs of the Miller test, the prosecution necessarily bears the burden of proving

the existence of community standards. United States v. Various Articles of Obscene Merchandise, 709 F.2d 132, 135-36 (2d Cir. 1983). When the prosecution chooses not to present any evidence of community standards it assumes the risk that the trier of fact might be unable to determine what the prevailing community standards are. In that situation, therefore, the jury would be required to enter judgment for the defendant on the basis that the prosecution had not sustained its burden of persuasion. Various Articles of Obscene Merchandise, 709 F.2d at 136.

On petitioner's appeal, in this case the court of appeals voiced agreement with the proposition of law set forth in Trainor. But the appellate court held that no error had been committed by the trial court's failure to give the requested instruction on the ground

that no such instruction was needed in this case because the jury had been instructed on "reasonable doubt" and because the defendant had put forth substantial evidence regarding the contemporary community standards of Cleveland. Opinion at 20-21; App. at A34-35. Neither of these facts responds to the ultimate need for instructing the jury as to their particular task in determining the existence of community standards, nor does either correct the error of omitting the requested instruction.

The timeliness and importance of this issue merit review by this Court. The lower courts are in need of a definitive statement about the necessity of instructing the jury that if it cannot determine the appropriate community standards, then it must return a verdict for the accused.

CONCLUSION

For the foregoing reasons, petitioner respectfully urges this Court to grant the petition for writ of certiorari and accept this case for review.

Respectfully submitted,

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THE SUPREME COURT OF OHIO

1990 Term
To wit: August 15, 1990

CASE NO. 90-574

STATE OF OHIO,

Appellee

-vs-

MARK FISCHER,

Appellant

E N T R Y

Upon consideration of the motion for an order directing the Court of Appeals for Cuyahoga County to certify its record, and the claimed appeal as of right from said Court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, $40.00, paid by Berkman, Gordon, Murray and Palda.

(Court of Appeals No. 56372)

THOMAS J. MOYER
Chief Justice

COURT OF APPEALS OF OHIO,
EIGHTH DISTRICT

COUNTY OF CUYAHOGA

COURT OF APPEALS CASE NO. 56372

STATE OF OHIO

Plaintiff-Appellee

-vs-

MARK FISCHER

Defendant-Appellant

JOURNAL ENTRY AND OPINION

Decided January 18, 1990

JUDGMENT: Affirmed

APPEARANCES:

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[2]PATTON, P.J.,

Defendant Mark Fischer was found guilty of pandering obscenity for selling tokens that enabled paying customers to view a videotape entitled "La Boomba." His nine assigned errors challenge (a) the validity of the seizure of the videotape; (b) the exclusion of expert testimony relating to community standards in the City of Cleveland; (c) various jury instructions; and (d) the length of his sentence.

Defendant was a clerk at the Detroit Avenue News, a bookstore offering general interest and adult titles for sale. In the rear of the store were several private booths in which a customer would insert a token and view portions of sexually explicit videotapes. Tokens could be purchased at the sales counter. Some booths offered several different videotapes for viewing; others featured only

one.

On February 1, 1988, a Cleveland Police Strike Force detective entered the bookstore and purchased five dollars worth of tokens. Defendant was not present at the time. The detective selected a booth in which "La Boomba" was playing. After viewing the entire videotape, the detective swore out an affidavit in which he detailed various acts of intercourse and oral sex that were graphically depicted on the videotape.

A search warrant was issued and the detective returned to the bookstore that afternoon. The detective purchased five dollars worth of tokens from defendant using a marked twenty [3] dollar bill. He reentered the same booth and proceeded to view the opening scenes of "La Boomba" in order to satisfy himself that it was the same videotape.

Following the second viewing, the

search warrant was executed. Strike Force members seized the videotape and the videotape player, along with the accompanying monitor.

I.

We first consider defendant's eighth assigned error in which he contends that the trial court erred by denying his motion to suppress the videotape seized from the bookstore. Defendant maintains that the bookstore was forced to close for the day since no employees were available to work the counter.[1/] He complains that the police action amounted to an impermissible and unconstitutional prior restraint on speech.

1/ The record shows that following defendant s arrest, he was told to telephone another employee to staff the bookstore. As soon as that employee entered the bookstore, he too was arrested for pandering obscenity. See April 12, 1988. Tr. at 23-25.

We note at the outset that defendant does not contest the validity of the search warrant or the execution of the search. Rather, he contends that his arrest amounted to an unconstitutional prior restraint since no bookstore staff was available to sell the various non-obscene materials in the bookstore.

[4]Since it is constitutionally unprotected speech, obscenity may be restrained prior to its dissemination. Freedman v. Maryland (1965), 380 U.S. 51. Punitive sanctions against the purveyors of obscene material do not rise to the level of prior restraints. In Paducah v. Investment Entertainment (C.A. 6, 1986), 791 F. 2d 463, the court stated in dicta:

> "If a bookstore operator were convicted for selling obscene material in his store and were sentenced to serve time in the state prison, his ability to continue to personally sell nonobscene books in his store

> would be foreclosed for the duration of his incarceration. But it is doubtful that he could make a valid argument that the state law under which he was incarcerated is a prior restraint of his right to engage in protected expression by selling nonobscene books."

791 F. 2d at 469; see, also, State, ex rel. Kidwell v. U.S. Marketing, Inc. (1981), 102 Idaho 451, 631 P. 2d 622, 627-628.

The punitive sanctions imposed have no direct restraint on the sale of obscene materials. Hence, this case is factually distinguishable from those cases in which state action has effectively closed a bookstore. Defendant's citation to Maguin v. Miller (D. Kan. 1977), 433 F. Supp. 223, falls into that category of cases. The operators of the Detroit News Bookstore may continue to sell nonobscene materials if they staff the bookstore. Since there was no prior restraint, the trial court properly de-

nied the motion to suppress evidence.

[5] II.

The first assigned error is that the trial court erroneously admitted into evidence a videotape that was different from the one viewed prior to obtaining the search warrant. Detective King's affidavit stated that the videotape entitled "La Boomba" was approximately thirty minutes in length. He reaffirmed that length at trial. The videotape played to the jury, however, had a running time of seventy-six minutes.[2/] The trial court admitted that videotape into evidence over defendant's objections that the seventy-six minute tape was not properly au-

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2/ It appears that the thirty minute version of "La Booma" was edited from the seventy-six minute version. When the search warrant was executed, police officers seized a videotape entitled "La Boomba" without realizing that the bookstore was showing different versions of that movie.

thenticated.

Evid. R. 901(A) sets forth a general requirement of authentication for evidence by requiring some evidence that the matter in question is what its proponent claims. St. Paul Fire & Marine Ins. Co. v. Ohio Fast Freight, Inc. (1982), 8 Ohio App. 3d 155. The ultimate question of authenticity is within the province of the jury. Weissenberger, Ohio Evidence (1985), 4-5, Section 901.3. Hence, the proposed evidence should be admitted if there is sufficient foundational evidence to constitute a rational basis for a jury decision that the primary evidence is what its proponent claims it to be. Id., Section 901.2.

[6]The videotape of "La Boomba" was offered as real evidence to support the charge of pandering obscenity. As such, there must have been a demonstration that the videotape was the tape viewed by Det.

King. Gutman v. Industrial Comm. (1942), 71 Ohio App. 383; see, generally, McCormack, Evidence (3 Ed. Cleary Ed. 1984) 667, Section 212. Detective King's testimony showed that the tape played to the jury was not the identical videotape he viewed prior to his swearing out the affidavit for the search warrant.

Despite the fact that videotapes of varying length were involved, we believe the trial court did not err by admitting the seventy-six minute long tape into evidence. As noted above, the jury is the final arbiter of authenticating evidence. Detective King's trial testimony specifically detailed the plot of "La Boomba" and the sexual acts depicted so that the jury could compare his description with what they actually viewed when shown the videotape. Regardless of the length of the videotapes, the jury could conclude that the sexual acts depicted

were of such a unique nature to that production that the videotape was authentic. Cf. Maumee v. Harris (May 23, 1986), Lucas App. No. L-85-057, unreported (despite failure to introduce videotape into evidence, substantial and credible corroborating evidence of content of videotape was sufficient to prove charge of showing material harmful to a juvenile). Moreover, we note that defendant does not contend that the sexual acts described by [7]Detective King in his affidavit differed in any respect from those depicted on the videotape shown to the jury. On these facts, we view the difference in the running time of the two videotapes to be of no significance given the uncontroverted similarity of sexual acts depicted therein. The first assigned error is overruled.

III.

The second assigned error raised

several arguments in support of the contention that the trial court erred by overruling defendant's motion for judgment of acquittal.

Prior to trial, the city elected to proceed under R.C. 2907.32(A)(5) which provides:

> (A) No person, with knowledge of the character of the material or performance involved, shall do any of the following:
>
> * * *
>
> (5) Possess or control any obscene material with purpose to violate division (A)(2) or (4) of this section.

In addition, the city charged defendant under R.C. 2907.32(A)(4):

> (4) Advertise an obscene performance for presentation, or present or participate in presenting an obscene performance, when such performance is presented publicly, or when admission is charged;

When considering a motion for judgment of acquittal brought pursuant to

Crim. R. 29(A), the court should not grant the motion and order an entry of judgment of acquittal if the [8]evidence is such that reasonable minds can reach different conclusions as to whether each element of the crime charged has been proved beyond a reasonable doubt. State v. Bridgeman (1978), 55 Ohio St. 261. With this standard in mind, we proceed to address the separate arguments.

A.

Defendant first argues that the seventy-six minute long videotape was insufficient as a matter of law to prove the charge of pandering obscenity. The reasons set forth in Part II, supra, apply with equal force to this argument. Moreover, we note that the difference in the running time of the videotapes had no material effect on the charges as set forth in the bill of particulars. It is apparent that either videotape contained

prohibited material under R.C. 2907.32. Therefore, the substance of the charge was not changed even if we were to assume that separate videotapes had been involved. See Crim. R. 7(D).

B.

Defendant next contends that the evidence was insufficient to prove that he had control of the videotape. He maintains that no inference of control could be raised from the fact that he was the sales clerk in the store at the time Detective King entered to view the videotape. Instead, defendant contends that he raised several reasonable theories of innocence that were ignored by the trial court.

[9] In State v. Kulig (1974), 37 Ohio St. 2d 157, the court determined that there are situations when circumstantial evidence is so attenuated that reasonable minds could never find that the essential

element of a crime had been established. Thus, if the defendant were to offer a theory that, under the specific facts of the case, could just as easily support his innocence, the trier of fact must acquit. State v. Nicely (1988), 39 Ohio St. 3d 147, 151. The Kulig standard, however, does not stand for the proposition that any theory of innocence offered by a defendant will suffice. First, that theory must be reasonable. Id.; State v. Graven (1978), 54 Ohio St. 2d 114, 118. Second, even if the theory of innocence is reasonable, Kulig does not stand for the proposition that a defendant must be discharged ipso facto. State v. Griffin (1979), 13 Ohio App. 3d 376, 377. In many cases, the competing theories raise a question of fact that must be resolved by the trier of fact. Once the trier of fact has reached its decision, an appellate court, in a case where circumstan-

tial evidence is relied upon, will reverse only where the evidence is insufficient as a matter of law to enable the trier of fact to exclude a reasonable hypothesis of innocence. State v. Gravens, supra, at 119. In other words, if the trier of fact determines that the connection between what is proved and what is sought to be proved is strong enough to support a finding of proof beyond a reasonable doubt, the [10]circumstantial evidence is sufficient. State v. Griffin, supra, at 378.

The jury could reasonably infer that defendant's duties as a clerk at the bookstore encompassed some form of control over the videotapes shown there. The evidence showed that defendant was the only employee on the premises at the time the offense occurred. He alone had the authority to dispense the tokens required in order to view the videotapes.

Assuming some malfunction or other technical difficulty with the videotapes occurred, the jury could reasonably infer that defendant was charged with the responsibility of correcting such a malfunction.

The above inference did not have to be proved beyond a reasonable doubt in order to survive a motion for judgment of acquittal. It was simply enough that reasonable minds could reach different conclusions on the narrow question of whether the evidence raised the inference that defendant controlled the videotape by exercising some form of dominion or authority over its use. On that basis, the motion for judgment of acquittal was properly overruled.

C.

It is also argued that the evidence failed to show that defendant possessed the requisite purpose to participate in

presenting an obscene performance. The argument here is that Detective King had a choice of several different videotapes to [11]view, none of which, besides "La Boomba," was charged or found to be obscene.

In order to determine whether defendant "knowlingly" participated in presenting an obscene performance, the totality of the circumstances must be examined. State v. Johnson (1978), 56 Ohio St. 3d 35, 38; State v. Head (1986), 32 Ohio App. 3d 70, 73. Precise knowledge of the contents of obscene material is not a prerequisite to satisfy the scienter requirement of R.C. 2907.32; knowledge of the character or nature of the obscene material is an adequate indicium of scienter to sustain a conviction under that section. State v. Burgun (1978), 56 Ohio St. 2d 354, paragraph two of the syllabus; State v. Loshin (1986),

34 Ohio App. 3d 62, 68.

Reasonable minds could infer that defendant had knowledge of the obscene character of "La Boomba." By selling the tokens which were the only means of activating the videotape players, the jury could conclude that defendant had knowledge of what type of videotapes were offered for viewing. Defendant's input into Detective King's videotape selection was irrelevant. So, too, was his knowledge of what the other videotapes depicted. For purposes of the Crim. R. 29 motion, it was enough to show from the totality of the circumstances that defendant was aware of the nature of videotapes being offered for viewing.

[12]D.

Finally, defendant maintains that there was insufficient evidence from which the jury could conclude that an admission was charged. He argues that

there was no evidence to establish that Detective King paid admission for the right to enter the front or rear of the bookstore.

The salient question is whether an admission was charged to view "La Boomba," not whether an admission was charged to enter a portion of the bookstore. Trial testimony established that the videotape machines could only be activated by inserting special tokens. These tokens were purchased at the sales counter. Moreover, each booth had a listing of the various titles available for viewing in that booth. Detective King testified that he purchased a token from defendant and used it to activate the videotape.

On these facts, we find there was sufficient evidence of admission adduced to foreclose the sought for judgment of acquittal. Certainly, admission into the

video booth itself constitutes no crime if nonobscene materials are shown for viewing. However, once the obscene videotape begins, the admission requirements of R.C. 2907.32 (A)(4) are fulfilled. In this respect we find defendant's citation to Davis v. State (Tex. Crim. App. 1983), 658 S.W. 2d 572 to be distinguishable. In Davis, the court found that no "admission" had been charged due to the fact that quarters, not tokens, were required to view [13]the videotapes. In addition, Davis noted that the viewer had no idea, much less choice, of what videotape would be shown. In this case, the viewer could only view "La Boomba" after purchasing the requisite tokens and making a selection among different options.[3/] On these facts, we

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3/ We do not mean to imply that our disposition of this argument would be different were the video booths
(Footnote con't.)

conclude the motion for judgment of acquittal was properly denied. The second assigned error is overruled.

IV.

The third assigned error is that the trial court erred by failing to allow defendant's expert to express an opinion as to whether "La Boomba" violated community standards. The expert, Dr. Joseph Scott, is a sociologist and criminologist who had conducted a random survey in Cleveland. The survey was specially designed to ascertain community standards regarding sexually explicit materials. After detailing Dr. Scott's qualifications and his methodology in conducting the survey, Dr. Scott was asked his opinion as to whether "La Boomba" would appeal to the prurient interest and

run in a manner similar to that in Davis, supra. We decide the issue of admission under R.C. 2907.32(A)(4) only on the facts before us.

whether it depicted, in a patently offensive way, sexual conduct specifically defined by applicable state law. The trial judge sustained the city's objections, ruling that Dr. Scott's opinion was inadmissible since it [14]embraced an ultimate issue. Defendant then proffered that Dr. Scott would have testified that the average person, applying contemporary community standards in Cleveland, would not find that "La Boomba" appealed to the prurient interest and was not patently offensive.

Dr. Scott's credentials as an expert in the field of human sexuality, sociology and obscenity were not challenged. Under Evid. R. 702, he was properly qualified as an expert witness due to his specialized training. See State v. Boston (1989), 46 Ohio St. 3d 108, 118-119. As an expert witness, Dr. Scott would be allowed to give an opinion on an

ultimate issue, despite the fact that the opinion would embrace an issue to be decided by the trier of fact. See Evid. R. 704. However, while expert testimony on an ultimate issue is not per se inadmissible, it is within the discretion of the trial judge to refuse to admit the testimony of an expert witness on an ultimate issue where such testimony is not essential to the jury's understanding of the issue and the jury is capable of coming to a correct conclusion without it. Bostic v. Connor (1988), 37 Ohio St. 3d 144, paragraph three of the syllabus.

Allegedly obscene materials are the best evidence of what they represent and expert testimony is not necessary to establish that they are obscene absent some indication that the materials are directed to such a deviant group that the experience of the trier of fact would be plainly inadequate to judge whether the

[15]materials appeal to the prurient interest. Urbana, ex rel. Newlin v. Dowling (1989), 43 Ohio St. 3d 109, 113; citing Paris Adult Theatre I v. Stanton (1973), 413 U.S. 49, 56, fn. 6. While a defendant in an obscenity prosecution is entitled to present relevant, competent evidence bearing on the issues to be tried, United States v. Hamlin (1974), 418 U.S. 87, 125, the alledgedly obscene materials remain the best evidence. Kaplan v. California (1973), 413 U.S. 115, 121.

The transcript demonstrates that the trial judge excluded Dr. Scott's opinion testimony for the reason that it embraced an ultimate issue. Exclusion of the testimony on that narrow basis was clearly contrary to Evid. R. 704. Our conclusion is reinforced by the lack of any showing that Dr. Scott's proposed testimony was cumulative or not essential to the jury's

understanding of the case. Hence, we find the exclusion to be error.

Although the exclusion of the expert testimony was error, we find that error to be harmless beyond a reasonable doubt. Crim. R. 52(A). Dr. Scott's opinion that the average person, applying contemporary community standards of the city, would not find "La Boomba" patently offensive was clearly not held by the jury. Presumably, Dr. Scott applied the same law as charged to the jury in forming his opinion. Had Dr. Scott's opinion been admitted, the jury would have been free to assess it whatever weight they wished. The eight members of the jury obviously disagreed with [16]Dr. Scott's conclusions. Their views represent "a cross section of a community and [have] a special aptitude for reflecting the view of the average person." State, ex rel. Newlin, supra, at 113, fn. 4. It is

apparent that their views would not have changed had Dr. Scott's opinion been allowed into testimony. They were allowed to review the results of Dr. Scott's survey and the methodology employed in conducting the survey. Defense counsel laid a meticulous foundation in preparation of eliciting the expert opinion. None of that testimony was stricken save the ultimate opinion, the context of which was plainly cognizable to the jury. On this record, we deem the error in excluding Dr. Scott's opinion testimony to be harmless. The third assigned error is overruled.

V.

The fourth, fifth, sixth and seventh assigned errors all question various parts of the court's instructions to the jury.

A.

Defendant first challenges the

court's instruction that "contemporary community standards" are what the community at large deems to be "acceptable." He argues that the proper standard is what the community will "tolerate."

This precise argument was rejected by the Supreme Court of Indiana in Sedelbauer v. State (Ind. 1981), 428 N.E. 2d 206. That court stated:

> "Appellant has attempted to construct an argument here based upon what we perceive to [17]be unrelated language lifted from context from opinions of the Supreme Court of the United States and has attempted to convince this court that the trial court should be reversed because of the choice between words, which according to the dictionary are virtually interchangeable. We hold the trial court did not err in using the word "accept" in giving instructions to the jury rather than the word "tolerate" as requested by the defendant.

Id. at 221.

We agree with the reasoning of Sedelbaurer and overrule the fourth

assigned error.

B.

Defendant next argues that the court erred by instructing the jury that under R.C. 2907.32(A), "knowledge of the character of the material" could be determined if the jury found that defendant "knew or should have known the nature of the content and character of the material ***" Defendant contends that a "should have known" instruction significantly lowered the scienter required to prove the charge of pandering obscenity.

R.C. 2901.11(E) states that a person has "knowledge of circumstances when he is aware that such circumstances probably exist." No where in that definition does it indicate that the culpable mental state of knowledge encompasses situations when a person should have known the nature of the circumstances. The inclusion of language indicating the culpable

mental state could be proven by proof that defendant "should have known" was error.

[18]Despite this error, we conclude that it was harmless. Under State v. Burgun, supra, knowledge of the character of the material may be shown solely by circumstantial evidence. Id., at 364. R.C. 2907.35(A)(2) provides that an employee of a bookstore engaged in selling materials, who, in the course of business does any of the acts prohibited by R.C. 2907.32, is presumed to have knowledge of the character of the material involved, if he has actual notice of the nature of such material, whether or not he has precise knowledge of its contents. See State v. Loshin, supra, at 68.

The presumption set forth in R.C. 2907.35(A)(2) was fully reinforced by the circumstantial evidence. While the book-

store sold general interest publications, it also sold a variety of sexually oriented material, artificial sexual aides and related paraphernalia. The various videotapes available for viewing were identified on the outside of each booth by posters. These posters contained still photographs of scenes that had the explicit sexual conduct depicted obscured by captions.

On these facts, we conclude that the inclusion of language in the jury instruction stating that culpability could be shown if defendant "should have known" the nature of the videotape "La Boomba" was harmless. Cf. State v. Adams (1980), 62 Ohio State 2d 151, paragraphs two and three of the syllabus; State v. Young (1987), 37 Ohio St. 3d 249, 254. Had the erroneous language of the jury instruction been deleted, there was more than sufficient [19]evidence upon which the

jury could conclude that defendant's knowledge had been proven beyond a reasonable doubt. The fifth assigned error is overruled.

C.

It is also argued that the court erred by failing to charge the jury on the definition of "purpose" as that word would apply to R.C. 2907.32(A)(5).

The failure of a trial court to separately and specifically instruct the jury on every essential element of each crime with which an accused is charged does not per se constitute plain error under Crim. R. 52(B). State v. Adams, supra, paragraph two of the syllabus. While defendant interposed a timely objection to the court's failure to define "purpose," we review this claimed error under Crim. R. 33(E)(4) which provides that no judgment of conviction shall be reversed in any court because of a misdi-

rection of the jury, unless the defendant was or may have been prejudiced thereby.

The jurors did not manifest any confusion over the word "purpose." Indeed, the common and legal meanings of "purpose" are not markedly different as used in the context of R.C. 2907.32(A)(5). We agree with defendant that the statutory definition of "purpose" should have been given. However, we cannot say that the court's failure to do so resulted in a manifest miscarriage of justice given the compelling evidence adduced at trial. The sixth assigned error is overruled.

[20]D.

Finally, defendant maintains that the trial court erred by failing to instruct the jury that they must find defendant not guilty in the event they could not determine what the standards of the community are in regard to sexual material.

To our knowledge, this issue has not been addressed by the Ohio courts. As noted by defendant, the Supreme Judicial Court of Massachussetts has stated, "[a] defendant is entitled to rulings or instructions that, if the trier of fact cannot determine Commonwealth norms, the defendant is entitled to a finding in his favor ***." Commonwealth v. Trainor (Mass. 1978), 374 N.E. 2d 1216, 1219. We agree with that statement as an abstract proposition of law. It was however, unnecessary to give that precise instruction since the jury was properly instructed that it must find defendant guilty beyond a reasonable doubt as to all elements of the offenses.

Moreover, the determination of contemporary community standards is a question of fact, determined individually by each juror taking into consideration the average person with average sex

instincts. Urbana, ex rel. Newlin, supra, at 112. Defendant presented copious evidence on this point through the use of statistics and survey results. Nothing in the record by way of question or deadlock in deliberations indicates that the jury could not determine the community standards in Cleveland. While defendant's proposed instruction may have some utility in the [21]proper case, we find no reversible error due to the court's failure to give such an instruction. The seventh assigned error is overruled.

VI.

The ninth assigned error complains that the trial judge abused his discretion by failing to consider the statutory criteria for sentencing as set forth in R.C. 2929.22. Defendant was sentenced to the statutory maximum term of six months imprisonment, three months of which was

suspended, and ordered to pay a fine of $1,000. See R.C. 2929.21. He was placed on one year's probation.

R.C. 2929.22 set forth various criteria to be considered by the court before it imposes sentence for misdemeanor offenses. Among the mandatory criteria is the obligation to consider these factors set forth in R.C. 2929.12 that favor a shorter term of imprisonment. See Columbus v. Jones (1987), 39 Ohio App. 3d 87; State v. Cable (1985), 24 Ohio App. 3d 88. A silent record raises the presumption that a trial court considered the factors contained in R.C. 2929.12, State v. Adams (1988), 37 Ohio St. 3d 295, paragraph three of the syllabus.

In this case, the record is silent as to whether the trial judge affirmatively considered the statutory criteria for sentencing set forth in R.C. 2929.12.

We must therefore presume that the court considered those factors. Adams, supra. Moreover, we note that the sentence imposed was within the [22]statutory limits set forth in R.C. 2929.12. While the sentence may appear to be a harsh one considering that defendant was simply an employee of the bookstore, we cannot conclude that the trial judge abused his discretion. See Toledo v. Reasonover (1965), 5 Ohio St. 2d 22, paragraph one of the syllabus. The ninth assigned error is overruled.

Judgment affirmed.

[23]It is ordered that appellee recover of appellant its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Garfield Heights Municipal Court to carry

this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

KRUPANSKY, J.,
DYKE, J., CONCUR.

PRESIDING JUDGE
JOHN T. PATTON

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof, this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

COURT OF APPEALS OF OHIO,
EIGHTH DISTRICT

COUNTY OF CUYAHOGA

COURT OF APPEALS CASE NO. 56372

STATE OF OHIO

Plaintiff-Appellee

-vs-

MARK FISCHER

Defendant-Appellant

NUNC PRO TUNC
JOURNAL ENTRY AND OPINION

The prior journal entry and opinion of this court released on January 18, 1990 contained an error on the cover page (page 1) and on the last page (page 23) which referred to this case as a criminal appeal from "Garfield Heights Municipal Court: and directing "Garfield Heights Municipal Court" to carry this judgment into execution.

Said "Garfield Heights Municipal Court" should have read "Cleveland

Municipal Court" in both instances.

IT IS HEREBY ORDERED that said journal entry and opinion of January 18, 1990 be amended nunc pro tunc to correct the error on the first and last pages (pages 1 and 23) of the opinion as stated above.

IT IS FURTHER ORDERED that, as so amended, said journal entry and opinion of January 18, 1990 shall stand in full force and effect as in all its particulars.

KRUPANSKY, J., _____
DYKE, J., _____ CONCUR.

_____
CHIEF JUSTICE
JOHN T. PATTON

COURT OF APPEALS OF OHIO,
EIGHTH DISTRICT
COUNTY OF CUYAHOGA

GERALD E. FUERST, CLERK OF COURTS

COURT OF APPEALS CASE NO. 56372

LOWER COURT NO. 88 CRB 1792-B
GARFIELD HTS. MUNI

STATE OF OHIO

Appellee

-vs-

MARK FISCHER

Appellant

MOTION NO. 00580

JOURNAL ENTRY

DATE: 02/09/90

MOTION BY APPELLANT FOR RECONSIDERATION IS OVERRULED.

KRUPANSKY, J.,
DYKE, J., CONCUR.

PRESIDING JUDGE
JOHN T. PATTON, C.J.

COURT OF APPEALS OF OHIO,
EIGHTH DISTRICT
COUNTY OF CUYAHOGA

GERALD E. FUERST, CLERK OF COURTS

COURT OF APPEALS CASE NO. 56372

LOWER COURT NO. 88 CRB 1792-B
GARFIELD HTS. MUNI

STATE OF OHIO

Appellee

-vs-

MARK FISCHER

Appellant

MOTION NO. 019858

JOURNAL ENTRY

DATE: 02/09/90

MOTION BY APPELLANT TO CERTIFY TO THE SUPREME COURT IS OVERRULED.

KRUPANSKY, J.,
DYKE, J., CONCUR.

PRESIDING JUDGE
JOHN T. PATTON, C.J.

CONSTITUTION OF UNITED STATES

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

CONSTITUTION OF UNITED STATES

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

CONSTITUTION OF UNITED STATES

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

OHIO REVISED CODE ANN.

Section 2907.32

(Page's 1987)

(A) No person, with knowledge of the character of the material or performance involved, shall do any of the following:

(1) Create, reproduce, or publish any obscene material, when the offender knows that such material is to be used for commercial exploitation or will be publicly disseminated or displayed, or when he is reckless in that regard;

(2) Exhibit or advertise for sale or dissemination, or sell or publicly disseminate or display any obscene material;

(3) Create, direct, or produce an obscene performance, when the offender knows that it is to be used for commercial exploitation or will be publicly

presented, or when he is reckless in that regard;

(4) Advertise an obscene performance for presentation, or present or participate in presenting an obscene performance, when such performance is presented publicly, or when admission is charged;

(5) Possess or control any obscene material with purpose to violate division (A)(2) or (4) of this section.